

NTSB Order No. EA-4405

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of October, 1995

Respondent .

Docket SE-13883

¹An excerpt from the hearing transcript containing the initial decision is attached.

91.119(b) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91),² and reversed the Administrator's 90-day suspension of respondent's airman certificate. After careful review of the record and evidence, we have determined to remand the case.³

The suspension order alleged:

1. You hold Private Pilot Certificate Number 502627115.
2. On April 10, 1994, you acted as pilot-in-command of civil aircraft N9178U, a Red and White Cessna 150M.
3. On April 10, 1994, during the above[-]described flight, you operated N9178U over the congested area of Horace, North Dakota, at an altitude of less than 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

In his answer to the complaint, filed December 8, 1994, respondent admitted all three allegations. He later admitted that: 1) he was the owner of N9178U, a red and white Cessna 150M, on April 10, 1994; 2) on April 10, 1994, N9178U made one flight; and 3) he was the pilot-in-command of that flight.⁴

²The regulation reads, in pertinent part:

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

* * * *

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

³The Administrator submitted a brief on appeal. Respondent, pro se, did not reply.

⁴Respondent also stipulated that the official time of sunset on April 10, 1994, in Horace, North Dakota, was 8:07 p.m. CDT and the time of darkness was 8:37 p.m. CDT.

(Respondent's response to interrogatories, dated March 14, 1995.)

At the hearing, the Administrator first offered the testimony of Eric Flaten, who stated that, on Sunday, April 10, 1994, he and his wife, Regina, saw, from their backyard, a red and white Cessna flying at an altitude of about 100 feet above the ground, or about 50 feet above the 50-foot trees, and that the aircraft made five or six passes in 10 minutes over the neighborhood.⁵ (Transcript (Tr.) at 20-22.) He stated that the aircraft came in at a slightly higher altitude, then dropped down, reduced power, glided over one part of the neighborhood, then the pilot gave the aircraft more power, and repeated the process, circling in a figure eight pattern.⁶

Mr. Flaten further testified that he had noticed a low-flying aircraft a week or two before, called the flight tower at Hector Field, and was told that nothing could be done unless he got the identification number and knew the exact time the low

⁵Although not current, Mr. Flaten is a private pilot and was a former Army airborne medic, where he gained experience in estimating distances.

⁶While referring to a map of the area on which his and respondent's houses had been marked, Mr. Flaten testified as follows:

[The aircraft] was on an easterly heading, and then it would swing around to the north, then come around and make another easterly heading. It was basically doing like a figure eight, but would always fly east about over this house right here, Nohrenberg's house, then swing around and one or two times it went around to the right. Most of the times it went to the left.

(Tr. at 20-21, Exhibit (Ex.) J-2.) When asked if he observed the aircraft doing any touch and goes, Mr. Flaten replied, "No, he was flying right over town. There is no airstrip here." (Tr. at 23.)

flight occurred. Pursuant to that instruction, when Mr. Flaten saw the low-flying aircraft on April 10, he ran into his house, got a piece of paper, came outside, "very clearly" saw the aircraft identification number, N9178U, wrote it down and then, to be sure it was accurate, he and his wife checked the number three times as the aircraft circled approximately 100 feet overhead. (Tr. at 23-24.) He deliberately noted that the low flight occurred between 7:25 and 7:35 p.m. Regina Flaten then testified that she too saw the small red and white airplane around 7:30 p.m. on April 10, 1994, flying just above the treetops, and that she and her husband could read the identification number clearly. (Tr. at 33.)

The next day, Mr. Flaten called the Fargo Flight Standards District Office (FSDO) and described the low flight to Verl Addison, an FAA Inspector.⁷ (Tr. at 26-27, Ex. A-3.) He and his wife then each sent a letter to the FSDO relaying what they had seen, including a description of the aircraft and its identification number. (Exs. A-1, A-2.) Mr. Flaten also testified that he did not know respondent, had never been to the West Fargo Airport, and had never before identified the number "N9178U" on an aircraft. (Tr. at 25-28.)

⁷Mr. Addison also testified about the telephone conversation he had with Mr. Flaten on April 11, 1994, and stated that he made a written record of the call afterward. (Ex. A-3.) That record is consistent with Mr. Flaten's testimony. Also, in a subsequent telephone conversation about the matter, Mr. Flaten again confirmed that he had seen that aircraft identification number on April 10, and that, in his opinion, the flying that he observed was not for the purpose of takeoff or landing. (Ex. A-7.)

While following up on the complaint, Mr. Addison spoke with Keith Schonert, the owner of West Fargo Aviation, the fixed-base operator at the West Fargo Airport.⁸ In a telephone conversation on April 11, Mr. Schonert told him that he had seen respondent at the airport on April 10 preparing his aircraft for flight sometime between 7:00 and 7:30 p.m.⁹ (Tr. at 43.)

Mr. Addison sent a letter of investigation, dated April 20, 1994, to respondent and subsequently had a telephone conversation with him on April 28. Almost immediately afterward, he wrote the following summary of the call:

Mr. Nohrenberg explained that he had flown on the evening in question, with a friend from Horace, but his flight had been approximately 45 minutes later than the one observed in the violation. Mr. Nohrenberg also stated that he had flown over Horace, but had not been very low. He stated that he had made a practice approach to a private grass strip just west of Horace, across the Sheyenne River, but had not landed because the field looked soft.

(Ex. A-5.) Mr. Addison then asked respondent for a written statement about the flight. In his letter, dated April 30, 1994, respondent said that he too saw a red and white Cessna flying over Horace on April 10, once in mid-afternoon, and again about

⁸Mr. Addison estimated that between 15 and 25 aircraft were based there. (Tr. at 42.) He also estimated that the West Fargo Airport is between 12 and 14 miles from the town of Horace. (Tr. at 52.)

⁹Mr. Schonert testified that he had not seen respondent at the airport, but had seen respondent's aircraft depart the runway. (Tr. at 64-65.) He also stated, however, that he could not remember all the details now, almost a year later, although he was sure that on the day after the event, his description to the FAA inspector of what he had seen would have been accurate. According to the record of that call, Mr. Schonert said he "noticed Mr. Nohrenberg flying his aircraft." (Ex. A-3.)

7:00-7:30 p.m. (Ex. A-6.) He related that the plane was "awfully low," but he did not see the "N" number. At about "7:45 or so," respondent wrote, he and his neighbor left his house for the West Fargo Airport. He further explained:

[W]e flew over Horace then back to W. Fargo, did some touch and goes, and called it an evening. But we were never close to the ground or trees, other than an aborted landing at Dean Benson's strip.

Mr. Addison estimated that Dean Benson's airstrip, which runs north to south, is about $1\frac{1}{4}$ to $1\frac{1}{2}$ miles from the west edge of Horace, about 2 miles from the grain elevators.¹⁰ (Tr. at 53-54.) He also estimated that it would probably take respondent 40-45 minutes to get from his home to lift-off. (Tr. at 56.) He concluded that if respondent left his home at 7:45 p.m., he would have been at the grass strip between 8:25-8:30 p.m. According to Mr. Addison, a takeoff from Dean's strip would not necessitate flying over Horace. (Tr. at 57, 117.)

In his defense, respondent maintained that, while he did operate his aircraft on April 10 over the town of Horace, it was

¹⁰These estimates could not be verified by consulting the map (Ex. J-2) because the air strip was located in an area that was not depicted on the map. Mr. Addison drew an arrow to indicate in what direction the air strip would be located, in relation to the map. (Tr. at 53.) However, it is unclear from the record exactly where he was estimating that the air strip was located.

Respondent's passenger stated she could not estimate the distance. (Tr. at 84.) Respondent testified that there is a diversion (body of water) about a mile west of Horace, there is a "mile road" at the westerly edge of the diversion, there is another mile road to the west, and immediately west of the second mile road is Dean Benson's air strip. (Tr. at 99-100.) No one else testified to the distance of Dean Benson's air strip from the town of Horace.

significantly later than 7:30 p.m. and was not at a low altitude, except when necessary for takeoff or landing.¹¹ He explained that he had seen a red and white Cessna 150 flying low over his neighborhood in the afternoon and again later, shortly after 7:00, and then again sometime before 7:30.¹² (Tr. at 92-93.) He testified that he then drove with a neighbor to the West Fargo Airport, a ride that took 15-20 minutes.¹³ (Tr. at 93.) Upon arriving at the airport, they looked at the five other airplanes in the carousel hangar, took respondent's airplane out, performed a walk-around and run-up, proceeded out onto the runway at 7:55 p.m., and took off around 8:00. (Tr. at 94.) They went out toward a grass landing strip west of town, but did not land because he saw water on the field and thought it was too soft, instead performing a touch and go. As he pulled up the aircraft, he noticed a crop duster at least a mile ahead, so he turned and

¹¹In written interrogatories, the Administrator asked respondent to list the time and location of takeoff and landing of the flight. He replied, "takeoff from West Fargo N.D. [at] 7:55 p.m. A touch & go at Benson[']s strip, landing at West Fargo N.D. at about 8:20 p.m."

¹²He stated the aircraft "had a two-toned red stripe and a little black one." (Tr. at 92.) He guessed that there are a few airplanes like that in the area, and he "couldn't even begin to guess whose plane it was." (Id.) Respondent's wife testified that she and her husband saw a small red and white plane flying low near their house sometime after 7:00 p.m. (Tr. at 67-68.)

Respondent's house is about 1,300 feet from the Flatens' house. (Joint Ex. 2.)

¹³In his April 30th letter to Mr. Addison, respondent stated that he and his neighbor left for the West Fargo Airport at "7:45 or so." (Ex. A-6.) At the hearing, respondent stated that the time he told Mr. Addison during their telephone call was an approximation, but that he said it was past 7:30. (Tr. at 101.)

flew over Horace at an altitude of less than 1,000 feet.¹⁴ (Tr. at 95-96.)

Three of respondent's neighbors testified that they saw a small red and white aircraft fly over their neighborhood on April 10, 1994, but that they knew it was not respondent because he was outside in his front yard at the time.¹⁵

The law judge found that the Administrator did not prove the allegations in the complaint by a preponderance of the evidence.

He stated, contrary to what we understand from the record, that most of the facts were undisputed, yet seemingly recognized that witness credibility was the key to the case. (Initial Decision at 123, 132.) However, while appearing to specifically find the

¹⁴Respondent testified that he pulled the aircraft up and turned left.

[A]t the time that we turned to a heading of 90 degrees, our left turn, a left 90-degree turn, [the crop duster] would have probably been still a mile ahead of us, and about 12:00, about straight ahead, and according to the tower it was moving southeast to northwest. And so we just turned, maintaining, you know, climb air speed, full power climb, and we went over Horace.

(Tr. at 95.) They flew straight over Horace, over the water tower, made one turn, and went directly back to West Fargo Airport, where they did one touch and go and one full stop. (Tr. at 96.)

His passenger offered a similar account of the facts except she did not remember seeing another airplane as they climbed from the grass strip. (Tr. at 83-84.) Regarding the timing of events before the flight, she estimated that they talked about the other planes at the hangar for 10-15 minutes, then took another 10-15 minutes to prepare the aircraft for flight. (Tr. at 87.)

¹⁵One neighbor stated that he saw the aircraft between 7:00-7:15 p.m., the other saw it between 7:15-7:45, and the third did not testify to a time. (Tr. at 69-79.)

Flatens' testimony to be credible, or at least more credible than the testimony of some of the other witnesses,¹⁶ he nevertheless concluded that there was insufficient evidence to show that respondent operated the aircraft that the Flatens had seen, even though "it may very well have been respondent's aircraft."¹⁷ (Id. at 134.) He then discussed the flight that respondent

¹⁶In assessing the evidence, the law judge stated:

[I]n the general scheme of things, Mr. Nohrenberg and his wife probably have something to gain, and so if you measure the testimony of the Flatens against the Nohrenbergs, all other things being equal, I would have to attach more weight to the Flatens' testimony simply because they have nothing to benefit from this.

(Initial Decision at 133.) He also found that respondent's passenger "probably had something to gain" from offering testimony favorable to respondent. Id.

¹⁷Regarding the Flatens' testimony, the law judge stated, "I certainly don't believe that Mr. [and] Mrs. Flaten have anything to gain by coming to court and taking the time out of their schedules to testify as they have today." (Initial Decision at 132.) He further explained:

"I think the testimony is clear that the Flatens saw an aircraft and that the tail number, they believed, was the same tail number as on Mr. Nohrenberg's aircraft. But at the time that they saw it, these other witnesses saw Mr. Nohrenberg in his front yard.

As to the incident that occurred as the Flatens have testified to it, I can only conclude that, at best, it may be a toss up, the burden being on the Administrator to establish that evidence by a preponderance of the evidence that Mr. Nohrenberg was operating that aircraft that they saw that evening. And it may have very well have been his aircraft, but I believe the testimony is that he was in his front yard working on his barbecue grill about that time frame, and so therefore I am just not convinced that it has been established that he was flying the aircraft.

(Id. at 133-34.)

admitted having made, and whether that flight was in violation of 91.119(b). He found that it was not.

We are puzzled by the law judge's conclusions, in that they are inconsistent with the evidence and his own credibility determinations. He did not find that the Flatens were mistaken about the aircraft they saw, the time, or the aircraft identification number. In fact, it appears that the law judge believed someone other than respondent had operated the flight that the Flatens witnessed. This theory, however, was never mentioned at trial and is unsupported by the evidence. Mr. Schonert saw respondent's aircraft depart the airport between 7:00 and 7:30 p.m; the Flatens saw the red and white Cessna and recorded the number "N9178U" between 7:25 and 7:35 p.m. Yet, respondent testified that he and his passenger arrived at the airport, discussed the several other aircraft at the hangar, and performed a preflight. His passenger testified that they discussed the other aircraft for 10-15 minutes, and that the ensuing preflight inspection took another 10-15 minutes. Respondent maintains that they then taxied at 7:55 and took off at about 8:00 p.m. Thus, it is impossible for N9178U to have made the flight that the Flatens witnessed and the flight that respondent asserts he commenced 20 minutes later.¹⁸

In short, the initial decision engenders several questions.

¹⁸No evidence was presented to suggest that anyone else had access to respondent's aircraft or that respondent noticed indications during his preflight check that his aircraft had just been flown.

For example, since the law judge found the Flatens' testimony credible, how can their testimony be reconciled with respondent's admission that he made one flight on April 10, in N9178U, the same aircraft that the Flatens saw? Even if someone other than respondent had flown his aircraft, the times are irreconcilable.

If the timing of the events was as both the Flatens and respondent maintain, surely respondent would have noticed that his aircraft had just been flown? In addition, although the law judge found that respondent's admitted low flight was incident to takeoff, that does not explain the three to four other low passes witnessed by the Flatens.

Given the substantial evidentiary inconsistencies either created or left unanswered by the initial decision, but which appear to be resolvable through a conscientious assessment of all of the relevant credibility issues, we cannot adequately review the law judge's conclusion that the Administrator did not meet his burden of proof. We will, therefore, remand the case to the law judge for the issuance of a written decision that fully explains whatever disposition the law judge finds warranted following a reexamination of the evidence of record.

ACCORDINGLY, IT IS ORDERED THAT:

The case is remanded to the law judge.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.